Attorney Docket No.: 13105.1

BOX TTAB NO FEE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Acorn Alegria Winery, dba Acorn Winery Opposer, v. Sweely Holdings, LLC Applicant.	Opposition No. 91/168,790 Appln. Serial No. 78/497,107, 78/497,110, 78/497,114

APPLICANT'S MOTION TO EXCLUDE OPPOSER'S HEARSAY TESTIMONY

Applicant Sweely Holdings, LLC, by and through undersigned counsel, respectfully moves pursuant to 37 CFR § 2.123(k) and Federal Rules of Evidence 801 and 802, to exclude Opposer's testimony regarding the purported existence of actual confusion of Opposer's and Applicant's marks (November 20, 2006 deposition of William Nachbaur ("Nachbaur dep.") at 65:25-66:25) and to strike section II.F from Opposer's trial brief, which relies entirely on this hearsay testimony. Applicant's Motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Background

Perhaps recognizing that its claims for likelihood of confusion are insubstantial, Opposer attempts to manufacture a flimsy claim of actual confusion based on inadmissible hearsay testimony of an employee of a vendor who is admittedly not even a

customer of Opposer's winery. The president of Acorn Alegria Winery, William Nachbaur ("Nachbaur"), testified about an alleged incident where an employee of a wine laboratory (also referred to as the "declarant"), Vinquiry Laboratory, purportedly confused the names "Acorn Hill" and "Acorn." (Nachbaur dep. at 65:25-66:25.) Opposer relies on this deposition testimony in its argument in section II.F of Opposer's Trial Brief, "Actual Confusion Exists Despite Applicant's Not Yet Having Begun Use of its Marks." Applicant's counsel objected to this hearsay testimony at the deposition. (Nachbaur dep. at 66:7-8.)

II. Argument

Opposer offers these out-of-court statements to prove the truth of the matter asserted: that the wine laboratory employee confused the two marks. These statements are, therefore, classic examples of inadmissible hearsay. See Fed. R. Evid. 801. Hearsay is not admissible unless it falls within an established exception. See Fed. R. Evid. 802. The hearsay statements in Nachbaur's testimony do not fall within any exception to the hearsay rule. See Fed. R. Evid. 803, 804, 807. Parties may object "to receiving in evidence any deposition . . . for any reason which would require the exclusion of the evidence from consideration." See 37 CFR § 2.123(k). Objections to hearsay are preserved even if not made at the deposition. See 37 CFR § 2.123(k); Fed. R. Civ. P. 32(d)(3)(A). Notwithstanding, counsel to Applicant objected to the hearsay testimony at the deposition, so there is no question that the right to object has been preserved. (Nachbaur dep. at 66:7-8.)

a. Admission of the Declarant's Statement Defeats the Purpose of the Hearsay Rule

Admission of the wine laboratory employee's statement would defeat one of the main purposes of the hearsay rule: to make sure that the witness with knowledge is present in court for cross-examination. Chambers v. Mississippi, 410 U.S. 284, 298 (1973). (The hearsay rule is "grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." Such evidence includes testimony by declarants who are "not subject to cross-examination" and whose "demeanor and credibility" may not be assessed.) Admission of this hearsay testimony would deny Applicant the critical opportunity to cross-examine the declarant to determine whether actual confusion really existed. The hearsay rule exists because it would be fruitless to question Nachbaur about the declarant's state of mind, because this is something he cannot know.

Opposer's brief makes assumptions about the declarant's mental state, stating that the declarant experienced actual confusion between the two trademarks and shortened "Acorn Hill" to "Acorn." There are, however, a number of other possible explanations for the declarant's behavior. For example, Nachbaur may have misheard the declarant. The declarant may have known the difference between the two marks and may have simply misheard Nachbaur when he stated the name of the account. Determining whether declarant's mistake was a result of short-lived confusion or whether some other explanation for the mistake exists is an important question of fact in applying an important part of the test for determining the likelihood of confusion between two marks set forth by the CCPA in In re E.I. du Pont de Nemours & Co., 177 U.S.P.Q. 563, 567

(C.C.P.A. 1973). Safeway Stores, Inc. v. Safeway Discount Drugs, Inc., 675 F.2d 1160, 1167, 216 U.S.P.Q. 599 (11th Cir. 1982) ("[s]hort-lived confusion . . . is worthy of little weight"); Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1110, 18 U.S.P.Q.2d 1587 (6th Cir. 1991) (short-lived confusion is of little weight in applying the DuPont test). Moreover, this hearsay testimony is of little value, since Nachbaur himself admitted that neither the wine laboratory nor its employee are customers of Acorn Alegria Winery. (Nachbaur dep. at 75:18-76:8); Homeowners Group, Inc., 931 F.2d at 1110, 18 U.S.P.Q.2d 1587 (confusion of non-customers is of little weight in applying the DuPont test); Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623, 634, 63 U.S.P.Q.2d 1659 (6th Cir. 2002) (citing Homeowners Group, Inc., 931 F.2d at 1110 (confusion is given "considerably less weight" in the absence of "chronic mistakes and serious confusion of actual customers"). Because Opposer relies solely on hearsay testimony, however, it would be impossible for the Applicant to determine relevant facts such as whether the wine laboratory or its employee are actual customers of Acorn Alegria Winery. This situation is a perfect illustration of the need for the hearsay rule. This hearsay testimony should be stricken because it denies Applicant the important opportunity to challenge the facts being asserted.

b. The Lab Employee's Statements Do Not Fall Within the Scope of Any Hearsay Exception

The wine laboratory employee's statements do not fall within any hearsay exception and are therefore inadmissible. Opposer has the burden of showing that the hearsay testimony in question falls within one of the hearsay exceptions. United States v.

Bartelho, 129 F.3d 663, 670 (1st Cir. 1997) ("[a] party who seeks admission of hearsay evidence bears the burden of proving each element of the exception that he asserts.") (citation omitted).

An examination of the recognized hearsay exceptions shows that none of the exceptions apply to the wine laboratory employee's statements. For example, the statement does not qualify under the exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." See Fed. R. Evid. 803(3). The words stated by the employee, "Acorn Hill" are not in any way a statement she made to describe her state of mind, emotional, or physical condition; they were merely interpreted by Nachbaur as evidence of the wine laboratory employee's confusion. See Fed. R. Evid. 803(3). The employee's statements are not "excited utterances" because they were not made while "under the stress of excitement caused by the event or condition." See Fed. R. Evid. 803(2). For the same reason, Opposer's testimony cannot be admitted as a present sense impression. See Fed. R. Evid. 803(1). The employee has not been exempted from testifying because of privilege, has not refused to testify, has not alleged a lack of memory, and is not dead or physically or mentally ill; nor has Opposer indicated that any attempt has been made to procure the declarant's testimony. See Fed. R. Evid. 804(a). The wine laboratory employee, therefore, does not meet the definition of "unavailable," and thus does not fall under the hearsay exceptions of Fed. R. Evid. 804(b).

c. Circuit Court and Trademark Trial and Appeal Board Precedent Support the Conclusion that Nachbaur's Testimony is Inadmissible Hearsay

Circuit Courts have held testimony of the type offered by Opposer here to be inadmissible hearsay because it is susceptible to confusion and varying inferences as to the reason for the declarant's mistake. See, e.g., Duluth News-Tribune, a Div. of Nw Publ'ns, Inc. v. Mesabi Publ'n Co., 84 F.3d 1093, 1098 (8th Cir. 1996) ("evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion'"); Vitek Sys., Inc. v. Abbott Labs., 675 F.2d 190, 193 (8th Cir. 1982) (citing Flintkote Co. v. Tizer, 158 F. Supp. 699, 702 (E.D. Pa. 1957), aff'd, 266 F.2d 849 (3d Cir. 1959)) (testimony of incidents of customer confusion offered by employees and consultants was inadmissible hearsay and such testimony "as to alleged confusion of third persons 'is ... one of the most unsatisfactory kinds because it is capable of such varying inferences'"). Similarly, courts have refused to apply the state of mind hearsay exception to testimony similar to Nachbaur's stating that no exception exists for hearsay testimony paraphrasing the state of mind of an unknown declarant. See, e.g., Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1331 (7th Cir. 1993) (refusing, "[w]ithout hesitation" to adopt "a new hearsay exception to the Federal Rules of Evidence for paraphrases of state of mind declarations by unknown declarants").

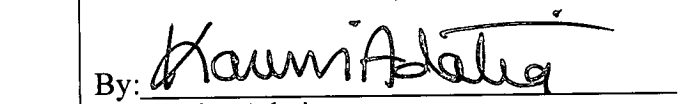
The Board has also found that such testimony is inadmissible hearsay. See, e.g., Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha, 77 U.S.P.Q.2d 1917, 1932 (T.T.A.B. 2006) ("vague hearsay accounts of alleged instances of actual confusion are of

no probative weight"); Blansett Pharmacal Co. v. Carmrick Labs. Inc., 25 U.S.P.Q.2d 1473, 1476 (T.T.A.B. 1992) (testimony offered by company president alleging actual confusion of pharmacists is hearsay and is "entitled to no probative value"); Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 U.S.P.Q.2d 1169, 1172 (T.T.A.B. 1987) (testimony from company president about a customer phone call offered as evidence of actual confusion is "inadmissible hearsay"); Transamerica Fin. Corp. v. Trans-American Collections, Inc., 197 U.S.P.Q. 43, 52 (T.T.A.B. 1977) (letters offered by Opposer as evidence of confusion are inadmissible where the letter writers are "not called as witnesses for examination and cross-examination as to the reasons for their mistaken beliefs").

For the foregoing reasons, Applicant respectfully requests that the Board exclude from trial any evidence or arguments about the hearsay statements of the Vinquiry Laboratory employee. A proposed Order is attached.

Respectfully submitted,

SWEELY HOLDINGS, LLC

By: 

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DATED this 13th day of July, 2007.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Exclude Opposer's Hearsay Testimony was served on counsel for Opposer, this 13th day of July, 2007, by sending same via electronic mail and U.S. First Class Mail, postage prepaid, to:

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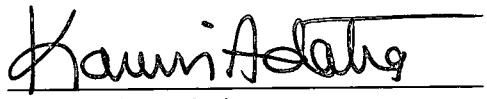

By: Karim Adatia

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Acorn Alegria Winery,
Dba Acorn Winery

Opposer,

v.

Sweely Holdings, LLC

Applicant.

Opposition No. 91/168,790
Appln. Serial No. 78/497,107,
78/497,110, 78/497,114

ORDER GRANTING APPLICANT'S

MOTION TO EXCLUDE OPPOSER'S HEARSAY TESTIMONY

The Board, having considered the Motion to Exclude Hearsay Testimony filed by Applicant, and good cause appearing therefore,

IT IS HEREBY ORDERED that any evidence or arguments about the hearsay statements of the Vinquiry Laboratory employee are excluded from trial.

Dated this ____ day of July, 2007.

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